

REMARKS

Claims 1-18 remain in the application.

Claims 16, 17 and 18 have been amended.

The Examiner has objected to claims 16-18 and has suggested language to overcome the objection. Applicants have amended the claims to include the Examiner's suggestions and, accordingly, respectfully request that the Examiner withdraw this objection.

The Examiner has objected to the drawings as not including the appropriate cross-section symbolic for plastic. Applicants are herewith including new drawings with the appropriate cross-section and respectfully request that the Examiner withdraw this objection.

The Examiner has rejected claims 1-18 under 35 USC §103(a) as being unpatentable over Kano et al in view of Bosl et al. Applicants respectfully transverse the Examiner on this ground of rejection.

The instant invention, as claimed, is directed to a closure for a fitment for a container wherein the closure is provided with a top wall and an outer side wall extending downwardly therefrom with an inner sealing ring spaced inwardly from the side wall. The outer side wall is provided with circumferentially spaced vertically extending ribs along an upper inner surface adjacent the top wall. The inner sealing ring has a lower terminating edge engageable with a lip of a fitment neck and the spacing between an upper portion of the ribs and an

upper portion of an outer surface of the sealing ring is less than the thickness of the fitment neck.

To the contrary, Kano et al does not teach nor remotely suggest a closure for a fitment which includes an outer side wall with circumferentially spaced vertically extending ribs along an upper inner surface adjacent the top wall. Moreover, Kano et al does not teach nor remotely suggest spacing between an upper portion of the vertically extending ribs and an upper portion of an outer surface of the sealing ring as being less than the thickness of a fitment neck. Kano et al teaches a closure which has a top wall and a downwardly extending side wall with an inner sealing ring spaced from an inner surface of the side wall. An annular seal piece, identified by the numeral 34, is disposed between the inner surface of the side wall and the inner sealing ring. In paragraph [003] of Kano et al, Kano et al teaches that the annular seal piece 34 is provided with an outer peripheral surface, identified by the numeral 40, which extends downwardly in a radially inward direction. This annular seal piece 34 is a continuous ring extending circumferentially of and for engagement with the outer surface of a neck of a fitment. In fact, the Examiner notes that Kano et al does not teach the claimed ribs in the instant application as being a plurality of spaced ribs. The Examiner combines the teachings of Bosl et al as allegedly correcting this deficiency.

However, even though Bosl et al may teach ribs, Bosl et al does not teach ribs which would be substitutable for the alleged circumferentially vertical rib 34 (annular seal piece 34) of Kano et al. The ribs of Bosl et al, identified by

the numeral 11, and set forth in column 3, lines 4-11, teach that the ribs 11 are on the inner side 10 of the top wall or cap base 2, not adjacent as claimed in the instant application. The ribs 11 are taught as extending radially for engagement of a sealing disc 5 whereas in the instant claimed invention, the vertically extending ribs, identified by the numeral 30, are positioned for engagement with a lip 16 of a container, not a sealing ring as taught by Bosl et al.

In rejecting claims under 35 USC 103, the Examiner bears the initial burden of presenting a prima facie case of obviousness. See In re Rijckaert, 9 F.3d 1531, 28 U.S.P.Q.2d 1955 (Fed. Cir. 1993); In re Oetiker, 977 F.2d 1443, 24 U.S.P.Q.2d 1443 (Fed. Cir. 1992). Here the Examiner has not represented a prima facie case of obviousness as to any of the rejected claims. A prima facie case of obviousness is established when the teachings of the prior art itself would appear to have suggested the claimed subject matter to one of ordinary skill in the art. See In re Bell, 991 F.2d 781, 26 U.S.P.Q.2d 1529 (Fed. Cir. 1993); In re Rinehart, 531 F.2d 1048, 189 U.S.P.Q. 143 (C.C.P.A. 1976). And, if the Examiner fails to establish a prima facie case, the rejection is improper and will be overturned. See In re Fine, 837 F.2d 1071, 5 U.S.P.Q.2d 1596 (Fed. Cir. 1988). This is not to say, however, that the claimed invention must expressly be suggested in any one of or all of the references. Rather, the test for obviousness is what the combined teachings of the references would have suggested to one of ordinary skill in the art. See Cable Electric Products, Inc. v. Genmark, Inc., 770 F.2d 1015, 226 U.S.P.Q. 881 (Fed. Cir. 1985); In re Kaslow, 707 F.2d 1366, 217 U.S.P.Q. 1089 (Fed. Cir. 1983); In re Keller, 642 F.2d 413,

208 U.S.P.Q. 871 (C.C.P.A. 1981).

Here the applied references also are not combinable. It has been long recognized that references are not properly combinable where none of the cited references suggests the desirability of the inventive combination. See Application of Imperato, 179 U.S.P.Q. 730 (C.C.P.A. 1973) cited by the CAFC for the same proposition in In re Sernaker, 217 U.S.P.Q. 1 (Fed. Cir. 1983), and In re Gordon, 221 U.S.P.Q. 1125 (Fed. Cir. 1984). The claimed invention must be considered as a whole. While a reference can be utilized for all that it teaches, focusing upon isolated portions of the reference of picking and choosing only that which supports a holding of obviousness is improper. Pertinent in this regard are also Panduit Corp. v. Dennison Mfg. Co., 1 U.S.P.Q. 2d 1593, 1602 (Fed. Cir. 1987) and In re Wesslau, 147 U.S.P.Q. 391 (C.C.P.A. 1965).

The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, not in Applicants' disclosure. In re Vaeck, 947 F.2d 488, 20 U.S.P.Q.2d 1438 (Fed. Cir. 1991). That is not the case here.

Also, here the Examiner has concluded that the claimed subject matter would have been obvious to one of ordinary skill in the art in view of the combined teachings of Kano et al with Bosl et al. The Examiner has admitted, however, that the subject matter required by the claims is not explicitly taught by Kano et al but has taken the position that even though Kano et al does not teach a plurality of space ribs, as claimed in the instant application, that the teachings of Bosl et al would correct this deficiency. However, Kano et al does not teach a

rib at all, much less a continuous rib as suggested by the Examiner, but teaches an annular seal piece 34 and Bosl et al does not teach a vertically extending rib, as claimed in the instant invention. Bosl et al teaches "on the inner side 10 of the cap base 2 there are arranged ribs 11 extending radially outwards" and the sealing ribs 11 are for engaging with a sealing disc 5, not a lip of a fitment or container neck. In essence, the Examiner has augmented the teachings that are explicit to Kano et al with an explanation of the rejection, not by evidence, but merely by the Examiner's own testimony. This makes the rejection fatally defective on its face. The unsupported opinion of the Examiner as to what would be done as known by one of ordinary skill in the art is of no import with regard to the question of obviousness of the Applicants' claims.

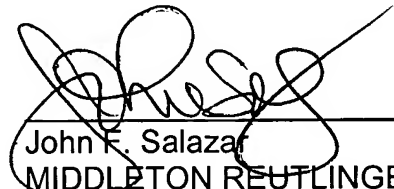
As pointed out above, it is the Examiner's burden to establish a *prima facie* case of obviousness by demonstrating by evidence on the record that the teachings of the prior art itself would have suggested the claimed subject matter to one of ordinary skill in the art. The evidence here does not support the present obviousness rejection.

In this case, even the first basic criteria of the *prima facie* case cannot be made. There is no suggestion in either the Kano et al or the Bosl et al references to combine the references. Nor is there a suggestion in the prior art to combine these references.

Thus, Applicants urge that the instant invention, as claimed, is not taught nor remotely suggested by the combination of references and respectfully request that the Examiner withdraw this rejection.

Applicants urge that the instant application is now in condition for allowance. However, if the Examiner believes there are other unresolved issues in this case, Applicants' attorney of record would appreciate a call at (502) 584-1135 to discuss such remaining issues.

Respectfully submitted,



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